No. 3427.

United States Circuit Court of Appeals

For the Ninth Circuit

PABST BREWING COMPANY,
a Corporation,
Plaintiff in Error,

vs.

E. CLEMENS HORST COMPANY,
a Corporation,
Defendant in Error.

Brief for Defendant in Error, E. Clemens Horst Company.

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The Anderson Printing Co., 416 J Street

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IN THE

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BRIEF OF DEFENDANT IN ERROR

This is a common law action to recover damages for the breach of a contract for the sale of two thousand bales of hops. This is the second time that this case has been before this Court for review. The first trial was had before a jury and a verdict was returned in favor of the plaintiff. This Court reversed the judgment for certain errors in the admission and exclusion of evidence. In the second trial a jury was waived and the case was tried before the Court without a jury. The second trial was conducted in accordance with the rules laid down by this Court and the errors for which the judgment was reversed were

avoided. All points decided on the former appeal become the law of the case.

Pabst Brewing Co. v. *E. Clemens Horst Co.*, 229 Fed. 913.

In the second trial the Court found that the plaintiff below agreed to sell to the defendant and the defendant to buy two thousand (2000) bales of choice air dried Cosumnes hops of the 1912 year crop for the price of twenty cents per pound plus freight to Chicago, which freight was two cents per pound; that the plaintiff tendered the hops; the defendant rejected them and on November 4, 1912, notified the plaintiff in writing that it cancelled and repudiated the contract; that the hops tendered were of the character contracted for; that plaintiff was ready, able and willing to deliver the quantity of hops of the quality specified in accordance with the terms of the contract; that the total amount of hops contracted for was 370,000 pounds; that the hops had a market price at Milwaukee on November 4, 1912; that the difference between the contract price and the market price of the hops at Milwaukee, Wisconsin, on November 4, 1912—the date that defendant refused to accept the hops—was six cents per pound.

No findings were requested by the plaintiff in error (the defendant below) and plaintiff in error did not present any findings to the Court and did not before the close of the trial or at any time ask the Court to adjudge that the evidence was insufficient

to support any finding and did not secure any ruling thereon and consequently took no exception to any ruling.

The plaintiff in error in its brief claims that the evidence is insufficient to sustain these two findings, to-wit: (1) the finding that the market value of the hops was six cents per pound below the contract price at the time of the repudiation of the contract and place of delivery and (2) the finding that the defendant in error was ready, able and willing to deliver hops of the quantity and quality specified in the contract. It complains of certain rulings which it says relate only to evidence affecting these two findings.

The plaintiff in error reargues the questions of fact embraced in these two findings and asks this Court to retry the case on the evidence submitted, to make itself a finding and to order that finding to be entered and the litigation ended. It says that nothing can be gained by a new trial, that the power to reverse includes the power to modify, and that this Court, upon conflicting evidence in an action at law, can direct the entry of a judgment contrary to that rendered by the Court below.

I.

FINDINGS OF FACT CANNOT BE REVIEWED

The two findings attacked are findings of fact and they cannot be attacked for insufficiency of evidence to support them for the reason that no findings were

requested by plaintiff in error nor did the plaintiff in error present any finding to the Court nor ask the Court to adjudge that the evidence was insufficient to support any finding and it did not secure any ruling thereon nor take any exception to any ruling or finding.

A finding of fact contrary to the weight of the evidence is an error of fact and where an action at law is tried without a jury by a federal court and it makes a general finding or a special finding of facts the Appellate Court is forbidden by the Act of Congress to reverse that finding or the judgment thereon.

> *Wear* v. *Imperial Window Glass Co.*, 224 Fed. 60. Revised Statutes Sec. 1011; U. S. Comp. Stat. 1913, Sec. 1672, p. 700.

The language of Circuit Judge Sanborn in the case just cited is peculiarly applicable to the case before the Court. In rendering the opinion of the Court he says:

> "This case was argued and submitted on the supposition that there were exceptions to rulings of the court below upon questions of law and an assignment of errors which presented some legal question to this court for review but a reading of the record and the briefs subsequently disclosed the fact that it was a mistake. The only question the specifications of error attempt to present is whether or not the evidence which is conflicting sustains the finding and the judgment of the court. They invite this court in other words, to retry the case, and to determine whether or not under the applicable law the weight of the evidence sustains the finding and

judgment. But the case was tried by the court below without a jury, and its decision of that issue is not reviewable in this court. It is like the verdict of a jury assailable only in the ground that there was no substantial evidence in support of it, and then *it is reviewable only when a request has been made to the trial court before the close of the trial to adjudge on the specific ground that there was no substantial evidence to sustain any other conclusion, either all the issues or some specific issue in favor of the requesting party.* No such request was made in this case, and the specifications of error, therefore, present no question reviewable by this court."

Wear v. *Imperial Window Glass Co.,* 224 Fed. 63.

When the question is raised in the Appellate Court that there is no substantial evidence to sustain a finding, such finding is reviewable only, as in trial by jury, when a request, or a motion has been made, denied, and excepted to, or some other like action is taken by which the question is fairly presented to the trial court and its ruling thereon during the trial secured.

Wear v. *Window Glass Co.,* 224 Fed. 63;
Barnsdall v. *Waltemeyer,* 142 Fed. 415;
United States Fidelity and Guaranty Co. v. *Board of Commissioners,* 145 Fed. 144;
Mercantile Trust Co. v. *Wood,* 60 Fed. 346;
Bell v. *Union Pacific R. Co.,* 194 Fed. 368;
Seep v. *Ferris-Hagarty Copper Min. Co.,* 20 Fed. 893;
Pennsylvania Casualty Co. v. *Whiteray,* 210 Fed. 782.

It was said by the Circuit Court of Appeals of the the Eighth Circuit:

> "The question whether or not at the close of a trial there is substantial evidence to sustain a finding in favor of a party to the action is a question of law which arises in the progress of the trial. In a trial by a jury it is reviewable on an exception to a ruling upon a request for a peremptory instruction. In a trial by the court without a jury it is reviewable upon a motion for a judgment, a request for a declaration of law, or any other action in the trial court which fairly presents the issue of law to that court for determination before the trial ends. The trial ends only when the finding is filed, or if no finding is filed before, when the judgment is rendered * * * *. No motion, request or act of this nature is recorded in the case in hand, so that the question of the sufficiency of the evidence to sustain the finding and judgment is not open for consideration by this court."
>
> *U. S. Fidelity & G. Co.* v. *Board of Commissioners,* 145 Fed. 151, 76 C. C. A. 114.

Speaking of certain special findings which were attacked as not being sustained by the evidence, the same Circuit Court of Appeals again said:

> "Whether or not they are supported by the agreed facts and the evidence is the question whether or not they are sustained by the weight of the evidence, and that is a question of fact, which, in a trial of an action at law by the court, as in the trial of such an action by a jury, the national courts are forbidden by the constitution and the laws to review. The only matter invoking the relation of the admissible evidence to the finding of fact of the court on an action at

law that is reviewable by a federal appellate court is the question of law whether or not there was any substantial evidence to sustain the findings, *and that question may be reviewed only when by motion, objection, request for a declaration of law, or some like action, that special issue has been presented to and decided by the trial court, and an exception to its ruling has been taken and allowed before the trial is concluded.* No such motion, objection or request was made in the court below, that court consequently made no ruling upon it, and no exception was taken to any such ruling, and the question of law whether or not there was any substantial evidence in the stipulation of facts and the testimony to sustain any of the findings of fact is not here for review."

Security National Bank v. *Old Natl. Bank*, 241 Fed. 6.

So, also, where a certain special finding was assailed in the Appellate Court on the ground that the evidence was insufficient to sustain it, the Court held that it could only be made a question of law for review in the Appellate Court, by requesting the trial judge to make some declaration that there was no such evidence or to render a judgment for the appropriate party because there was no such evidence, and, upon his refusal to do so, taking proper exception and assigning error thereon.

Felker v. *First Natl. Bank*, 196 Fed. 200.

It is unnecessary to cite the numerous cases in which this principle has been applied. We shall content ourselves with calling the attention of the Court

to a recent decision of this Court where—a jury having been waived—special findings of fact were made in favor of one of the parties. One of these special findings was attacked on the ground that the evidence was insufficient to support it. At the close of the testimony in the case referred to there was no request by the plaintiff in error in that case for a finding in its favor on the issues, and by no motion or request did it present to the trial court, the question of law whether there was substantial evidence to sustain findings for the defendant in error. This Court held that the sufficiency of the evidence to sustain the finding attacked was not open to review in this Court.

> *H. F. Danberg Land & Live Stock Co.* v. *Day*, 247 Fed. 477.

In an action tried by the Court findings of fact are conclusive on the Appellate Court, though it might have reached a different conclusion on the evidence.

> *National Surety Co.* v. *Globe, etc. Co.*, 256 Fed. 601.

II.

THE FINDING AS TO THE MARKET PRICE OF HOPS AT MILWAUKEE AT THE TIME OF THE BREACH OF THE CONTRACT.

Assuming, however, that the two special findings attacked are subject to review for insufficiency of evidence, we shall consider the evidence, and show that they are sustained by the evidence. The plain-

tiff at best can claim a conflict. If there is any evidence at all to sustain the finding, conceding they are reviewable, such evidence is sufficient. Practically the only question before the Court was the amount of damages that should be awarded the plaintiff below. The evidence on both sides was introduced in conformity to the rule laid down by this Court on the former appeal. (229 Fed. 913.)

Naturally as in cases of this character, there was a conflict of testimony as to the market price of the hops (the subject of the controversy) at the time of the repudiation of the contract on November 4, 1912, or thereabouts. The Court found that the difference between the contract price and the market price of the rejected hops at Milwaukee on November 4, 1912, —the time that the defendant cancelled the contract and refused to accept the hops as tendered by defendant in error to plaintiff in error—was six (6) cents per pound. (Record, p. 20.)

The contract price for the hops was twenty cents per pound at California points, plus freight to Milwaukee, which, it was agreed by all the witnesses, was two (2) cents per pound, making the contract price at Milwaukee twenty two (22) cents per pound. The Court thus found that the market price of these hops on November 4, 1912, at Milwaukee, was sixteen cents per pound. The Milwaukee price, as testified by all the witnesses, was the same as prices at Chicago or other eastern points.

The only question is, was there any evidence to sustain this finding.

The best evidence is, perhaps, that furnished by *actual sales* of these hops at or about the time of the repudiation of the contract.

The plaintiff in error (defendant below) brought out himself on cross examination of witness Horst that the hops raised by defendant in error, of which plaintiff in error agreed to buy 2000 bales during the months of November and December, 1912, were sold at Eastern points at the following prices, to-wit:

November 12, 1912, fifteen cents (15c) per pound;

November 20, 1912, fifteen and one-half cents (15½c) per pound;

November 19, 1912, sixteen and one-half cents (16½c) per pound;

November 20, 1912, sixteen cents (16c) per pound;

November 16, 1912, eighteen cents (18c) per pound;

November 12, 1912, fifteen cents (15c) per pound;

November 12, 1912, fourteen and one-half cents (14½c) per pound;

November 20, 1912, sixteen cents (16c) per pound;

November 13, 1912, sixteen cents (16c) per pound;

November 20, 1912, fifteen cents (15c) per pound. (Record, pages 67-68.)

All these hops were sold from samples 1 to 20 introduced in evidence, being the same hops which the plaintiff in error (Pabst Brewing Company) reject-

ed. This evidence was not called for by defendant in error but was brought out by plaintiff in error.

Some of these sales, to-wit, one to Springfield Brewers Company at fifteen cents per pound, one to Frank Steil Brewing Company at fourteen and one-half cents per pound, and the one to F. W. George Company at sixteen cents per pound were made by the witness Horst personally.

As the plaintiff in error brought out this testimony itself, of course, it cannot complain.

The plaintiff in error contended that price of Oregon hops was practically the same as Cosumnes hops at that time. (Record, page 87, fol. 107.)

Plaintiff in error (defendant below) brought out on cross examination that the price of Oregon hops ran from ten (10) to twelve (12) cents per pound, the outside price was about fourteen (14) cents per pound. (Record, pages 87-88, fol. 107, 108.)

The witness Horst testified in answer to questions asked by plaintiff in error that he bought choice Oregon hops from ten (10) to twelve (12) cents per pound, one lot November 25, 1912, at 13½ cents per pound, another lot December 2, 1912, at 12½ cents per pound. (Record, page 88.)

Witness Horst testified that the market value of choice Cosumnes hops in Milwaukee in November, 1912, was 14 cents a pound. That was the range of prices from the first of November until about the first of January. The market was dead all the time. The company of which witness was President made sales of Cosumnes hops during the months of

November and December, 1912, in the eastern brewing centers, at Chicago and New York, and eastern points where the market value was the same as at Milwaukee. The freight rate was the same. The freight rate is 2 cents from California. In the sales of plaintiff's hops in November, 1912—choice Cosumnes hops—in November or thereabouts, the prices ran about 14½ cents to about 17½ cents; they averaged about 15 cents. (Record, p. 49-50.)

F. W. George, who in 1912 was a hop dealer in New York, and who in that year sold hops all over the United States and Canada, and a part of whose business was to become familiar with the market prices of the various kinds of hops, and who made efforts to ascertain from other dealers for what hops were being sold in the market and the prices paid, and who had himself bought choice Cosumnes hops in 1912 and afterwards sold them as choice Cosumnes hops in the regular course of business, and who knew the market price of choice Cosumnes hops in Milwaukee, in November, 1912, testified that the market price of choice hops, the kind contracted for, in Milwaukee in November, was fifteen (15) cents per pound. (Record, pp. 93-94.)

On December 1, 1912, the witness testified that the market price at Milwaukee for hops of the kind rejected by plaintiff in error was fifteen and one-half (15½c) cents to sixteen (16c) cents per pound. (Record, p. 94.)

His testimony was:

"Q. Now do you know the market price of choice Cosumnes hops in Milwaukee in the month of November, 1912? A. Yes.

"What was the market price? A. I would take the market price for the price I paid for them.

"What was it? A. I paid 13 cents delivered. The market price was 15 cents delivered in Milwaukee; that would be 13 cents in California. I paid 15 cents or 15¼ cents, I am not positive which. I am speaking now of November 13, 1912. Between that and January 1, 1913. I think they declined somewhat; it was a dead market; there was not much doing. On December 1, 1912, I would say that the market price of choice Cosumnes hops in Milwaukee was about 16 cents delivered—15½ to 16 cents." (Record, page 94.)

Flood V. Flint, who has been a hop dealer and grower in the Sacramento valley for thirty years, and who has grown hops in the Cosumnes river for ten years, and who had bought and sold as a dealer on commission, and who kept familiar with the price of hops, getting prices by daily telegrams, and who was acquainted with the market price of choice Cosumnes hops in Milwaukee, testified that the market price of choice Cosumnes hops in Milwaukee on November 4, 1912, was about fourteen cents (14c) per pound. (Record, page 272.)

He testified on cross examination that he based his estimate on the fact that he had offers of twelve cents and in the ordinary daily business he offered according to instructions. (Record, p. 274.)

It was for the Court below to weigh the evidence.

We, however, call the attention of the Court to

some glaring statements and inconsistencies, in the evidence produced by the plaintiff in error.

M. D. Wormser, in a deposition, testified:

> "The relative price of Cosumnes and *Oregon* hops and Washington hops and Mendocino hops and Sonoma hops and Russian River hops were about the same as Cosumnes." (Record, page 190.)

It was developed by the plaintiff in error on cross examination of witness Horst that the market price of choice *Oregon* hops was from ten to twelve cents a pound, one lot was bought November 25, 1912, at 13½ cents per pound, and another on December 12, 1912, at 12½ cents per pound. (Record, p. 88.)

If Cosumnes sold the same as Oregons the price would not exceed 14 cents.

It was for the Court below to weigh these contradictions.

Again, Wormser classes Russian hops as being of the same grade as Cosumnes hops and also the same as Oregons. (Record, p. 190.)

Witness Horst says Russian River hops are considered very high in grade. The highest grades are Yakimas, Russian Rivers, then Oregon and Sonomas, then Western Washington; then Yuba County and Yolo County, are higher than Sacramento. (Record, p. 108.)

If Wormser classes the high grade Russian hops as of the same grade as Cosumnes and gives the same market price to each and if there is a market differ-

ence in the grade, it was for the Court below to weigh the evidence.

Again, witness Wormser says that the relative price of Sonoma hops and Cosumnes hops was the same. Witness Murphy, another witness for plaintiff in error says "Cosumnes hops are usually a cent below Sonomas." (Record, page 194.)

Witness Murphy says "the trade do not quote the price of Cosumnes hops; they do quote the price of Sonoma hops and in 1912 Cosumnes and Sonoma hops were about the same value." (Record, page 196.)

If the witness does not know anything about the price of *Cosumnes* hops, it is for the trial judge to say how far the price of Sonoma hops which is a better hop can affect the price of Cosumnes hops.

His testimony relates to "Pacific Coast" hops and he classes them altogether. (Record, page 196.)

So far as the trade journals were concerned there is no question but that they are *admissible in evidence* to be weighed with other evidence and they were received without objection.

But, as testified to by witness for plaintiff in error:

> "The journals referred to by me as being accepted by the trade did not attempt to show how many bales *nor what the prices were, for which they sold* as definite transactions.
>
> "They secured their information and published the range of prices whatever it was as an *interpretation* of the facts which were *reported to them* by the dealer." (Record, page 197.)

Witness George, as developed by the plaintiff in

error on cross examination, testified that he was familiar with the quotations contained in the Brewers Journal and "I found them wrong most all the time." (Record, page 98.)

G. C. Schumacher, another witness called by plaintiff in error, did not know anything at all about the price of Cosumnes hops. He testified:

> "I based the price of choice Cosumnes hops on the price of choice Oregon and choice Sonomas. We always figure that the Cosumnes are worth about a cent less than those qualities. Cosumnes hops were close to the price of Oregon and Sonomas in 1912, but I should think they were and would say so but I have no definite recollection on that point. *I do not know of any trade paper of any kind that quoted Cosumnes hops in November,* 1912. (Record, pages 203, 204.)

If, as stated by this witness, the price of Cosumnes hops is to be governed by the price of Oregon hops we have the testimony of Horst that he bought choice Oregon hops in November, 1912, from ten to twelve cents a pound. (Record, p. 88.)

This witness (Schumacher) testified also that the price of hops would depend upon the samples:

> "You might call it a choice and I might call it a prime. That is a matter of opinion.
> Q. And that is a matter very largely of individual opinion, is it not? A. Yes sir." (Record, page 206.)

This witness also admitted that if the buyer knew that the hops tendered to Pabst had been rejected it would affect the opinion of the buyer. (Record, p. 207.)

He also admitted that during the month of November, 1912, the price of hops had declined. (Record, page 208.)

Witness stated that:

> "Sonoma hops and Mendocino hops are always more in demand than Cosumnes or Butte County or the cheaper grades. A man who wants Sonoma hops will not ordinarily accept Cosumnes hops, consequently they are not changeable merely at a difference in price. The Sonoma hops represent what in the brewing trade is known as the highest quality of California. They are nearer the Oregon type and are distinguishable from the Sacramento type. The Cosumnes are one of the Sacramento type." (Record, pages 208, 209.)

From this testimony it will be seen that the witnesses who testified for the plaintiff in error classed Cosumnes hops as Pacific Coast hops, along with the Sonoma hops, which latter are of a higher grade. If the Oregon type is better than the Cosumnes type, and if choice Oregons were sold in November, 1912, at from ten to twelve cents as testified by Horst (Record, page 88), a finding that Cosumnes hops were worth sixteen cents is very favorable to plaintiff in error.

If any other witness testified to a price different than that of witnesses called, for defendant in error, it simply made a conflict in the evidence.

III.

FINDING AS TO DEFENDANT IN ERROR BEING ABLE, READY AND WILLING TO DELIVER.

The finding that the defendant in error was not able, ready and willing to deliver the hops contracted for is also attacked. Assuming that this finding can be reviewed, the evidence abundantly sustains it.

The contract called for the delivery of two thousand bales of hops of the 1912 harvest.

T. L. Conrad who was superintendent in charge of growing hops for the defendant in error in 1912 in the Cosumnes District testified that there were 4300 bales of cleaner picked hops and 200 bales that were not cleanly picked, making 4500 bales. (Record, p. 91.)

He kept a record with reference to the number of bales. (Record, p. 92.)

Witness Horst who is the president and manager of the defendant in error testified:

> "Q. Will you state whether or not the hops that you grew on your place in 1912, were or were not choice air dried Cosumnes hops. A. Yes.
>
> "Q. State whether you were able or not to deliver out of the 4300 bales you have specified the 2000 bales of hops for the purpose of filling this contract for the Pabst Brewing Company. A. Yes. The samples sent to them were choice air dried Cosumnes hops and they were from these bales." (Record, p. 99.)

He also at another time testified:

> "November 4, 1912, plaintiff had on hand and was able to deliver 2000 bales of strictly choice Cosumnes hops to the defendant." (Record, p. 55, 58.)

It was agreed that a part of the evidence used on the former trial should be used in this trial where Horst testified on cross examination:

> "Yes I have a distinct memory that we had over 3000 bales of hops on hand at the time that Pabst rejected. I know that.
>
> "Q. Where were those bales? How do you know there were 3062 instead of 3015? A. I don't know whether there were 3062 or 3061, but I know there were over 3000 bales." (Record, p. 78.)

Again he testified:

> "On November 4, 1912, we had on hand 3000 odd bales of choice Cosumnes hops. There were about 1300 or 1400 or 1500 bales on the Coast. I am giving you just off-hand figures, and about 400 in Milwaukee; about 600 in New York, about 500 or 600 in transit; something in that neighborhood, and the total made over 3000 bales.
>
> "Are you testifying from a memory of those facts, or from records that you have? A. Well, for those particular figures that I am giving now, I read over the testimony that I gave on the former trial.
>
> "Q. That testimony is based upon figures that were based upon your books is it not? A. Of course at that time when I gave the testimony before, then I knew the figures, then the situation was comparatively new, but now I base my present statement upon reading the testimony on the former trial.

"Q. At the former trial didn't you testify that you had to go to your books in order to get that information? A. I had to go to my books to get exact figures, but in a general way I knew the figures without the books—I knew them at the time.

"Q. As a matter of fact, weren't 300 bales that you gave as being in transit actually sold and delivered at that time? A. No. We were very careful to check up the record with anything we gave you in transit, that was not at that time delivered.

"THE COURT: I certainly think with a little consideration this trial can be considerably shortened. It seems to me any evidence went in at the former trial might be stipulated correct here, and supplement it by such additional testimony as either side wish to introduce.

"MR. POWERS: If your honor rules against me on the proposition of where these 3062 bales were—

"THE COURT: How do you mean ruling against you as to where they were?

"MR. POWERS: As to striking out the testimony of this witness' memory, when it was based on books—

"THE COURT: I cannot accede to your suggestion that it is based on books. He has just repudiated that a moment ago.

"MR. POWERS: He said about, and he gives now the figures.

"THE COURT: He has testified here within five minutes that his present testimony is given by refreshing his memory as to what he testified to before; but his memory at that time was refreshed as to the substantive facts, that he had had that quantity of hops on hand either here or in transit, or in Eastern points; that he had to go to his books for the specific figures, which, of course, one would assume that would be necessary to do, but that he knew in a general

way the qualities and location of those hops. That is not a dependance upon the books." (Record, p. 80-81.)

Of the hops in question about 1500 bales were on the coast, 400 bales in Milwaukee, 600 bales in New York, 500 to 600 bales in transit. (Record, p. 79.)

In the Court below the plaintiff in error attempted to establish the proposition that the only hops which the defendant in error had ready to deliver was the quantity on the coast.

In the brief of plaintiff in error it is conceded that 4350 bales of hops were produced. (Brief, p. 36.) Plaintiff in error says that the amount sold was 2764 bales. This concedes 1586 bales. These are the bales on the Pacific Coast testified to by witness Horst. Plaintiff in error claims that the bales of hops in transit amounting to 500 to 600 bales and the hops in warehouses in the East were sold. The witness Horst testified that these were not sold; that they were forwarded to Eastern points to be applied on prior contract of sales of *Pacific Coast* hops They were not sold until after November 4, 1912, the date of repudiation of the contract. (Record, p. 58.)

The times at which the hops constituting a portion of the 3000 bales on hand on November 4th, 1912, were sold were given. They were sold after November 4th, 1912. (Record, p. 67.)

At another point in the record it was testified by witness Horst:

"We had on hand 3000 bales of choice Cosum-

nes hops on November 4th, 1912." (Record, p. 55.)

Plaintiff in error examined the so-called invoice book of the defendant in error in which certain entries appear showing that certain of these hops were assigned to certain brewers for subsequent sale and delivery if accepted and claims these to be sales. The matter was fully gone into in the Court below and it was explained that when it became evident that the plaintiff was endeavoring to get a ground for the rejection of the hops in suit, Horst Co. shipped a quantity of them East to be sold to other brewers if Pabst Co. finally refused to take them, and to be sold only after such refusal. These hops were in warehouses and were always in the ownership, possession and control of the defendant in error until actually sold after November 4th, 1912, as explained by the witness. (Record, p. 58.)

It appears by a night telegram of September 27th, 1912, that the plaintiff in error was trying to resell these hops and wished them kept on the Coast. Defendant in error was willing to hold them on the Coast if plaintiff in error would accept deliveries, otherwise, it wanted to ship a part of them to the East to be sold. (Record, p. 30.)

The contract was repudiated November 4th, 1912. Between September 27th, 1912 and November 4th, 1912, certain hops were sent East remaining in the control, in warehouses, however, of defendant in error. Defendant in error had as testified over 3000

bales on hand to satisfy the 2000 bale contract with plaintiff in error.

Witness Horst also testified that he and one of the attorneys had made up a list which showed that the defendant in error had over 3000 bales of hops on hand on November 4th, 1912. The evidence is as follows:

> "Q. (By Mr. Powers, attorney for plaintiff in error) How do you know that you actually had 3062 bales available on November 4th? A. I know from this list here that you and I made up yesterday that I had over 3000 bales. Invoice number 1077, referring to lot 509 was made up in the New York office." (Record, page 84.)

The defendant in error did not rely on books but the witness produced knew of his own knowledge of the quantity of hops which the defendant in error had on November 4, 1912.

It was sought to contradict him by entries in books. These entries did not relate to the sale of hops but were meant to show their location and hops were still in the possession of the defendant in error until applied to a particular sale delivered and accepted. (Record, p. 85.)

IV.

CERTAIN RULINGS ASSIGNED AS ERROR.

There are certain rulings to which we suppose plaintiff in error does not attach much weight as they are not argued at length, but we shall notice them.

None of them were in way prejudicial to the rights of plaintiff in error, and the plaintiff in error now assigns different grounds of objection from what it did in the Court below.

1. As to asasignment of error No. 48 Witness George was asked the question:

"If you had a quantity of 2000 bales of hops to sell in the East in Milwaukee what would be a reasonable time to dispose of those hops at the market price. Could you expect to sell 2000 bales of choice Cosumnes hops at Milwaukee at the price then prevailing in thirty days?" The principal objection to the question was that the question was confined to Milwaukee.

The objection if it had any value, was cured by the Court asking:

"What would be your answer to that if the question were to confine it to the Eastern market instead of Milwaukee alone?"

The witness explained that the market was a lifeless one—a declining market—and his answer embraced the entire East. (Record, p. 95.)

2. The next assignment is the refusal to allow a question to Witness George as to the value of Oregon hops. The reason given in the Court below was that the question was to test his memory. The reason now assigned is an entirely different one. (Record, p. 91.)

3. The question asked witness George: "If other Cosumnes hops at that time were selling to brewers at from 22 to 24 cents per pound would not that (a sale of Horst's manufactured hops for 16 cents) in-

dicate that these hops which were sold by you to the Narragansett Brewing Company a poor quality?"

We do not find this question in the record. But as there is no objection raised in the brief to the finding that hops were of the quality contracted for the question is immaterial.

The judgment should be affirmed.

Respectfully submitted,
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